

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

BRIEF FOR APPELLANT

IN THE **83**
United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 10,313

HERMAN KADAN, *Appellant*,

v.

UNITED STATES OF AMERICA, *Appellee*.

Appeal from the United States District Court for the
District of Columbia.

United States Court of Appeals
For the
District of Columbia Circuit

FILED FEB 14 1950

Joseph W. Stewart
CLERK

J. RAYMOND CLARK,
Attorney for the Appellant,
1713 M Street, N. W.,
Washington, D. C.

INDEX

	Page
Jurisdictional Statement	1
Statement of the Case	2
Rules Involved	4
Points Raised on Appeal	4
Summary of Argument	4
Argument	5
Conclusion	10

TABLE OF CASES

Brady v. United States, 39 F. 2d 312.....	6
Castellini v. United States, 64 F. 2d 636.....	8
Coco et al v. United States, 289 F. 33.....	8
Commonwealth v. Dauphinee et al, 183 A. 807, 121 Pa. Sup. 565.....	9
Filiatreau et al v. United States, 14 F. 2d 659.....	8
Lucas v. United States, 104 F. 2d 225, 70 App. D. C. 92.....	6
Maxey v. United States, 30 App. D. C. 63.....	6
McElroy v. United States, 17 S. Ct. 31, 164 U. S. 76, 41 L. Ed. 355.....	5, 8
State v. McCarthy, 31 A. 2d 921, 130 Conn. 101.....	9
United States v. Davidson, 4 Cranch C. C. 576, Fed. Cas. No. 14,922.....	6
United States v. Haupt, 136 F. 2d 661.....	7
United States v. Liss, 137 F. 2d 995.....	9
United States v. Tuffanelli, 131 F. 2d 890.....	9

RULES

Federal Rules of Criminal Procedure	
Rule 14.....	4, 5

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 10313

HERMAN KADAN, *Appellant*,

v.

UNITED STATES OF AMERICA, *Appellee*.

Appeal from the United States District Court for the
District of Columbia.

BRIEF FOR APPELLANT.

JURISDICTIONAL STATEMENT.

The jurisdiction of this Court is invoked under Title 17, paragraph 101 of the District of Columbia Code (1940 Ed.) to review the action of the District Court in this proceeding. The court below entered a judgment of conviction from which this appeal is taken.

STATEMENT OF THE CASE.

Appellant was indicted in the January Term, 1949, in criminal case numbered 204-49. (Appellant's App. 2A) This indictment contained three counts. The first count of the indictment charged this appellant, Herman Kadan, Joseph H. Scheve, Theodore J. Scheve, and Hyman Rosen with having set up a gaming table for the purpose of playing games of chance for money and property known as craps and dice games continuously from about October 1, 1948, to about January 6, 1949. The second count charged Joseph H. Scheve with assaulting one Robert A. Ricker with intent to kill on or about January 6, 1949. The third count charged Joseph H. Scheve with assault upon one Robert A. Ricker with a dangerous weapon, that is, a loaded pistol, on or about January 6, 1949. To summarize, count one charged four defendants with a violation of the gaming statute, to wit Title 22, Section 1504 of the District of Columbia Code. The appellant was one of those four defendants and the first count was the only one in which he was charged. Counts two and three charged another of the four defendants named in the first count and only him with violations of Title 22, Sections 1501 and 1502 of the District of Columbia Code.

Appellant was arraigned February 11, 1949, plead not guilty, and moved the court below to grant him a severance from the defendant Joseph H. Scheve, on counts two and three on the ground that to be tried with the said Joseph H. Scheve on those two counts would prejudice his rights before the jury on his trial of the charges in count one. (Appellant's App. 4A) This motion was argued before trial and denied by the court. (Appellant's App. 4A) The motion was renewed at the beginning of the trial, at the conclusion of the Government's testimony, and at the conclusion of the entire case, but was denied in each instance.

Appellant was brought to trial before a jury on April 25, 1949, and on April 28, 1949, the jury returned a verdict of guilty against each of the four defendants in count one and

convicted the defendant, Joseph H. Scheve, on one of the other two counts. (Appellant's App. 5A) Appellant's motion for a new trial based upon the court's refusal to grant a severance was denied (Appellant's App. 7A) and appellant was sentenced to one to three years in prison, but the trial judge allowed the appellant to remain on bond pending disposition of his appeal because of his belief that a substantial question of law was involved in the application for severance. (Appellant's App. 74A) Notice of appeal was filed June 10, 1949.

More than two-thirds of the testimonial evidence offered by the Government in the trial related to the charges against defendant Joseph H. Scheve, in counts two and three. That portion of the testimony relevant to the gaming charges in count one consisted almost entirely of the testimony of one Robert A. Ricker, who was revealed by that testimony to be a shiftless person with no legitimate source of income. (Appellant's App. 25A-30A)

The said Ricker testified that sometime during the first week of October, 1948, and on various occasions thereafter, he went to 2730 Woodley Place, N. W., in the District of Columbia where he engaged in a dice game. He testified further that he lost a sizable sum of money during this period in these games. During that same period of time Ricker admitted that he had lived at a number of different places, mostly hotels, that he was unemployed, and that he had no source of income other than the charity of his wife, his wife's family, and other female acquaintances. He testified that his wife's whereabouts were unknown to him at the time of the trial. He stated that on January 6, 1949, his wife had demanded \$850 of the defendant, Joseph H. Scheve, and that if that sum had been paid her, he, Ricker, would not have complained against any of the four defendants in count one. (Appellant's App. 13A-30A)

Appellant alleges error in that the court refused his motion for severance thus compelling him to present his defense before the same jury hearing the trial of the assault charges in counts two and three, thereby prejudicing appellant's rights in his trial on the charge in count one.

RULES INVOLVED.

Federal Rules of Criminal Procedure:

Rule 14. If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires.

POINTS RAISED ON THIS APPEAL.

The court below erred as follows:

(1) In denying appellant's motion for severance and trial separate from that of defendant, Joseph H. Scheve, on counts two and three of the indictment.

(2) In denying appellant's motion for a new trial based upon the denial of the motion for severance.

SUMMARY OF ARGUMENT.

In the present case appellant was indicted and tried below with defendant, Joseph H. Scheve, who was charged in count one together with appellant and two others with gaming, and in counts two and three individually with assault. Appellant's motion for a separate trial of defendant, Joseph H. Scheve, on counts two and three was improperly denied by the court below. It is conceded that as a general rule an application for severance by one jointly indicted with another is addressed to the discretion of the trial court and should only be reviewed upon a showing of abuse of discretion resulting in prejudice. It is submitted however, that this general proposition was born and nurtured in cases where defendants were all indicted for the same or very closely related offenses, and that it is not to be applied dogmatically in a case such as this where the co-defendant is tried for distinct and unrelated crimes. Where the offenses are unconnected, as here, prejudice is almost unavoidable

and can be presumed, and denial of separate trials is an abuse of discretion.

There is a clear showing of prejudice here in that appellant exercised his constitutional right not to testify in his own behalf, and yet in testifying as a witness for the defendant, Joseph H. Scheve, on the charges in counts two and three, some involuntary self-incrimination was almost unavoidable.

The critical issue is whether or not it is proper to compel a defendant jointly charged with one crime to stand trial with another defendant charged with that crime and with additional crimes, distinct from and in no way a part of the offense for which all are jointly tried. We submit that this question has been settled in the negative since the very persuasive opinion of Mr. Chief Justice Fuller in the Supreme Court in 1896 in *McElroy v. United States*, 17 S. Ct. 31, 164 U. S. 76, 41 L. Ed. 355.

ARGUMENT.

Denial of Severance Prejudiced Appellant in His Defense to Gaming Charge in that it Compelled Him to Stand Trial With a Co-Defendant Charged Also With Distinct and Unrelated Offenses Involving Violence.

Rule 14 of the Federal Rules of Criminal Procedure, entitled, "Relief From Prejudicial Joinder," confers upon the trial court the power to order an election, a separate trial of counts, a severance of defendants, or whatever other relief justice requires, if it appears that a defendant is prejudiced by a joinder of offenses and/or defendants for trial. It is clear in this case that appellant was so prejudiced and this was properly brought to the attention of the court below before trial through the medium of a motion to sever appellant's trial on count one from that of the defendant, Joseph H. Scheve, on counts two and three. This motion was renewed at various stages during the course of the trial, but was denied in each instance, improperly so, it is submitted.

It is unnecessary to cite the many cases affirming and reaffirming the proposition that severance rests in the discretion of the trial court which will be reversed only upon a clear showing of abuse. Appellant has no quarrel with that proposition of law as such so long as it is limited in its application to the class of case in which it has usually been enunciated, namely those involving several defendants charged jointly with the same offense or offenses. To apply that maxim to this case, without careful analysis of the vitally distinguishing factors here would be grossly erroneous. In an early case which held separate trials to be discretionary, *United States v. Davidson*, 4 Cranch., C.C. (4 D. C.) 576, Fed. Cas. No. 14,922 (1835), the two defendants were indicted jointly for assault and battery. A similar result was justified in *Maxey v. United States*, 30 App. D. C. 63 (1907) where defendants were jointly indicted for abortion resulting in death, and in *Lucas v. United States*, 104 F. 2d 225, 70 App. D. C. 92 (1939) where they were indicted jointly for entering and larceny. There are many other cases supporting the proposition that severance is discretionary, but it is submitted that in none of these was a defendant compelled to stand trial with one charged with a distinct and unrelated crime.

Appellant here had no objection to standing trial with defendant, Joseph H. Scheve, for gaming, for which all four defendants were jointly indicted in count one, but he very properly objected to placing his fate in the hands of the same jury that was hearing evidence against the said Joseph H. Scheve on the assault charges, crimes of violence with which appellant was totally unconnected except for the unfortunate accident of their being alleged to have occurred in or near his home. The yardstick of prejudice and abuse of discretion must vary in this case from that used in trials for joint or related counts or indictments. As the court pointed out in *Brady v. United States*, 39 F. 2d 312 (CCA 8th 1930), what constitutes abuse of discretion in denying separate trials depends upon the whole situation in each

case. The whole situation here is that appellant was prejudiced by being linked in the minds of the jurors with a man on trial for crimes of extreme violence. He wished to avail himself of the constitutional privilege not to testify in his own behalf, yet as a witness for the defendant, Joseph H. Scheve, on counts two and three, some involuntary self-incrimination was unavoidable even though the scope of the cross-examination was properly restricted by the trial judge. In *United States v. Haupt*, 136 F. 2d 661 (CCA 7th 1943), where incriminating statements had been limited by the trial court to the defendant by whom they were made, the court on appeal expressed a doubt that prejudice could so easily be avoided, saying (p. 672) that it would be a "herculean feat" for any jury to so limit its consideration of the damaging evidence. Similarly, it is contended here, no jury however conscientious, could fail to draw an inference prejudicial to the appellant, from his failure to testify on the gaming charge against him, while at the same time appearing as a witness on the assault charges. The careful skirting of the gaming issue in both direct and cross-examination of the appellant, it seems could only serve to emphasize to the jury the inference that appellant did not testify in his own behalf because he had something to conceal.

McElroy v. United States is the leading authority on the prejudicial effect of joining defendants charged with different offenses. In that case four indictments charging different groups of defendants with different crimes were consolidated for trial. Only some of the defendants were named in all four indictments in that case. Speaking for the court, Mr. Chief Justice Fuller stated the basic principles which we ask this Court to reaffirm as follows (p. 80):

"It is clear that the statute (Section 1024 of the Revised Statutes) does not authorize the consolidation of indictments in such a way that some of the defendants may be tried at the same time with other defendants charged with a crime different from that for which all are tried. And even if the defendants are the same in

all the indictments consolidated, we do not think the statute authorizes the joinder of distinct felonies, not provable by the same evidence, and in no sense resulting from the same series of acts."

Fuller, J., then went on to say (p. 81):

"It cannot be said in such a case that all the defendants may not have been embarrassed and prejudiced in their defense, or that the attention of the jury may not have been distracted to their injury in passing upon distinct and independent transactions. The order of consolidation was not authorized by statute and did not rest in mere discretion."

It is contended that the *McElroy* doctrine remains good law today, unimpaired by those later cases involving persons charged jointly with the same offense, wherein severance has been held to be discretionary. The distinction between such cases and a situation like that before the Supreme Court in the *McElroy* case and before this court here was aptly pointed out in *Filiatreau et al. v. United States*, 14 F. 2d 659 (CCA 6th 1926) where the court said, citing *McElroy v. United States* (p. 661):

"Conceding that joinder or consolidation is improper where the offenses are different and independent of each other, but merely contemporaneously committed by different individuals . . . here there was but a single joint violation."

A similar distinction was made in *Coco et al. v. United States*, 289 F. 33 (CCA 8th 1923), wherein the *McElroy* case was again cited with approval.

In *Castellini v. United States*, 64 F. 2d 636 (CCA 6th 1933) the appellant was indicted for false entries and misappropriation of bank funds with different co-defendants. The court said there (p. 637):

"The allegations of each count of both indictments were based upon separate and distinct acts and transactions . . . it is apparent that the consolidated indict-

ment charged separate and distinct offenses not all provable against the same defendants. We think, therefore, that the question of consolidation should have been ruled by *McElroy v. United States* . . ."

The court then went on to grant a new trial notwithstanding the acquittal of the appellant on the false entries charge. Separate trials have been granted upon appeal in similar situations in some of the state courts. *State v. McCarthy*, 31 A 2d 921, 130 Conn. 101; *Commonwealth v. Dauphinee et al.*, 183 A 807, 121 Pa. Sup. 565.

Frank, J., best expressed the current state of the law on this subject in *United States v. Liss*, 137 F. 2d 995 (CCA 2d 1943) at page 1004 where he said, concurring in part and dissenting in part:

"It has been thought that the full vigor of the *McElroy* doctrine has been somewhat mitigated. But in the cases where it has been so held, the several charges were very closely connected."

It is submitted that the several charges were not at all closely connected in this case, except through the accidents of a similarity in time and place, and that the *McElroy* doctrine is binding on this appeal.

In *United States v. Tuffanelli*, 131 F. 2d 890 (CCA 7th 1942) Kerner, J., speaking for the majority, said (p. 893) ". . . it is not good practice to join in an indictment counts charging distinct offenses against separate defendant," but then went on to hold that the joinder had not been prejudicial in that case. Commenting on the majority opinion, Major, J., dissenting in part in the same case, expressed what we conceive to be a more accurate and a more just statement of the law in this situation, where he said at page 894:

"It is a poor consolation to a defendant who is forced to trial, improperly joined with other defendants, for a reviewing court merely to disapprove 'the practice followed' with an expression of doubt that his rights have

been prejudiced. It should be remembered that the government, not the defendant, is the one responsible for the situation, and should be charged with the burden of clear demonstration that no prejudice has resulted. Ordinarily, prejudice should be presumed from such a practice."

CONCLUSION.

The many cases holding that the denial of a motion for severance can only be reversed upon appeal upon showing of a clear abuse of discretion are in point here only insofar as they point out that there must be some compelling reason for separate trials. It is submitted that there is such a compelling reason where a defendant is brought to trial with one charged with distinct and unrelated offenses, and there is no general plan linking together the various charges. In such a case prejudice is presumed, and it becomes more apparent where the defendant is a witness on those other crimes while at the same time electing not to testify in his own behalf.

The court below, in permitting appellant to remain free on bail pending disposition of this appeal, expressed the opinion that the application for severance raised a substantial question of law. It seems that the *McElroy* case, vigorous for more than half a century, permits only one decision on that question of law.

It is respectfully submitted that the court below erred in denying appellant's motion for severance, and that the judgment below should be reversed.

J. RAYMOND CLARK,
Attorney for the Appellant,
1713 M Street, N. W.,
Washington, D. C.

